

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 09-50026-mg  
MOTORS LIQUIDATION COMPANY, . Chapter 11  
Debtors. .  
One Bowling Green  
New York, NY 10004  
Tuesday, November 7, 2017  
4:03 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE  
**BEFORE THE HONORABLE MARTIN GLENN**  
**UNITED STATES BANKRUPTCY COURT JUDGE**

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1 (Proceedings commence at 4:03 p.m.)

2 THE COURT: All right. This is Judge Glenn. We're  
3 on the record in Motors Liquidation, 09-50026. I have the list  
4 of appearances in front of me. Who's going to begin?

5 MR. KARLAN: Your Honor, this is Mitch Karlan for the  
6 GUC Trust. With Your Honor's permission, I'll begin. We asked  
7 for this conference yesterday. At the time we asked for it,  
8 there were perhaps as many as a half a dozen issues that we  
9 thought would require Your Honor's attention. I'm pleased to  
10 report that in the 24 or so hours that have elapsed, counsel  
11 have worked out among themselves all but one of those. And  
12 with Your Honor's permission, I'll describe it.

13 THE COURT: Go ahead.

14 MR. KARLAN: So, Your Honor, we -- GUC Trust is  
15 requesting guidance from the Court and the opportunity to brief  
16 the issue on an expedited basis with respect to certain  
17 documents that are arguably covered by a written common  
18 interest agreement entered into between Wilmington Trust and  
19 certain of the unitholders back in 2014. There were document  
20 requests served in this case both by the plaintiffs and by the  
21 unitholders on the GUC Trust. And certain documents covered --  
22 certain documents that were -- would have been responsive to  
23 those document requests are covered by the common interest  
24 agreement. And we did not produce those and identified those  
25 -- or revealed that we were not producing those in our

1 privilege log which the parties served yesterday pursuant to  
2 the scheduling order. What prompts this call and my request  
3 for guidance is the following, Judge. There -- we have  
4 identified about six documents that are arguably --

5 THE COURT: Say that again, Mr. Karlan, you said six?

6 MR. KARLAN: Six.

7 THE COURT: Okay.

8 MR. KARLAN: Six documents that are arguably covered  
9 by the common interest agreement and which we have therefore  
10 not produced but that we would like -- we, the GUC Trust, would  
11 like to have the ability to introduce in evidence at trial.  
12 The terms of the common -- of the common interest agreement do  
13 not permit us to do that without the consent of the other side  
14 to the agreement, and that consent has not been forthcoming.  
15 We'd like guidance on two questions.

16 First, some of the document -- some of these six  
17 documents were written by the GUC Trust lawyers not by the  
18 unitholders lawyers. We think that we have the right or should  
19 be given the right to disclose those documents without the  
20 permission of the unitholders.

21 Second, we would like Your Honor's guidance on  
22 whether the unitholders can preclude us from using the  
23 remaining six -- of the six documents that were written by  
24 their side in a situation where the facts have changed and we  
25 are now, at least with respect to this one issue, adverse to

1 each other with the unitholders taking a position different  
2 than we're taking on the question on whether the agreement is  
3 binding or not, the proposed agreement.

4 I don't pretend that these are easy issues to decide.  
5 I don't pretend that they're clear, which is why I think Your  
6 Honor would probably want briefing, and we would certainly ask  
7 for permission to give it. But this is a situation that is  
8 somewhat fraught with a danger for the trustee, and we would  
9 like to do whatever we do with the guidance of Your Honor.

10 THE COURT: Okay. How many of the documents, Mr.  
11 Karlan, fall into the second category where they're offered or  
12 prepared by unitholders counsel that you want to be able to  
13 use?

14 MR. KARLAN: Five.

15 THE COURT: Okay.

16 MR. KARLAN: I'm sorry. I'm sorry, Judge. I'm -- I  
17 apologize. That's not correct. Excuse me just one second.  
18 Let me --

19 THE COURT: Sure.

20 MR. KARLAN: Let me redo this. I'm sorry. Four,  
21 Judge.

22 THE COURT: Okay. All right. Let me hear from other  
23 counsel who want to be heard on this issue.

24 MS. NEWMAN: Good afternoon, Your Honor. It's  
25 Deborah Newman from Akin Gump Strauss Hauer & Feld on behalf of

1 the participating unitholder. Your Honor, the documents that  
2 Mr. Karlan is referring to were exchanged between counsel for  
3 the GUC Trust and counsel for the participating unitholders in  
4 connection with the plaintiff's claims against the trust and  
5 the potential settlement of those claims. And with the express  
6 understanding -- not only because of the written agreement that  
7 was signed between the participating unitholders and the GUC  
8 Trust in 2014 but also because of the continued oral  
9 understanding between the parties that their communications  
10 were subject to a common interest privilege. That's why we did  
11 believe, both sides, both Gibson and Akin Gump, understood that  
12 those communications were protected by a common interest  
13 privilege and the documents that are written by Gibson Dunn  
14 attorneys are actually expressly labeled "common interest  
15 privilege" on the top in big, bold letters.

16 We understand that there is some case law holding  
17 that parties to a common interest agreement may use otherwise  
18 -- documents that would otherwise be subject to a common  
19 interest privilege against one another when they become  
20 adverse. However, those instances involve direct adversity  
21 between the two parties in two-party disputes. They do not  
22 have a situation we have here where the plaintiff -- there's a  
23 multi-party dispute and it just so happens that the  
24 participating unitholders disagree with the position that the  
25 GUC Trust has taken.

1           But in fact we have not yet filed a joinder, and we  
2 may not file a joinder. We may rely on the plaintiffs to carry  
3 the torch. We normally file a joinder but we don't believe  
4 actually that that would be the determining factor here. This  
5 is not the type of dispute that is contemplated in those cases  
6 that allow common interest materials to be used against parties  
7 to a common interest agreement. So we don't believe that this  
8 is the type of situation that would allow for that. And even  
9 if such adversity did exist, we don't think that the GUC Trust  
10 could unilaterally waive the common interest privilege with  
11 respect to third parties such as New GM and the plaintiffs.

12           And so while we don't actually have a problem were  
13 the GUC Trust to use the six documents in question in  
14 isolation, we don't actually believe that the documents are  
15 helpful to the GUC Trust's position. We're very concerned that  
16 the GUC Trust desire to use these documents could result in an  
17 argument by someone either in this proceeding or down the line  
18 that there has been a subject matter waiver by the GUC Trust  
19 and that all of the otherwise privileged documents could now be  
20 subject to discovery in, again, either this matter or another.

21           And so we would object to the use of these documents  
22 for that reason unless there was an order providing that the  
23 use of the documents, those six documents, could not result --  
24 you know, would not leave -- or that parties -- other parties  
25 now or in the future would be precluded from arguing that the

1 GUC Trust use of those documents resulted in a waiver of any  
2 other documents subject to the common interest privilege or if  
3 the documents were somehow filed under seal and disclosed only  
4 to the Court and the participating unitholders that's -- that  
5 the privilege could be maintained.

6 THE COURT: Ms. Newman, let me ask you a question.  
7 With respect to the six documents that were written by the GUC  
8 Trust lawyers, do any of those six contain information that was  
9 provided to the GUC Trust lawyers by the unitholders lawyers?  
10 Or it -- is it -- I'm just trying to understand. I want to be  
11 clear as to whether it reflects solely the analysis, views,  
12 facts sourced from the GUC Trust counsel versus documents that  
13 may have incorporated information they received pursuant to a  
14 common interest agreement from the other parties to the  
15 agreement.

16 MS. NEWMAN: Uh-huh. I understand the question, Your  
17 Honor. This is the first time we've heard Mr. Karlan  
18 articulate that the -- one of the bases on which he's seeking  
19 this relief or guidance is that some of the documents were  
20 written by the GUC Trust, and so I would have to go back and  
21 look more closely at the documents to answer that question.

22 THE COURT: Okay. Anybody else want to be heard?  
23 Hearing nobody speaking up, I'm assuming not.

24 One of the sources that I used in trying to analyze  
25 issues similar to these is the Restatement of Law Governing

1 Lawyers. And I don't have it in front of me. I -- I've got a  
2 copy in my office, and I'm on the bench because this is -- this  
3 is on the record. And I don't know -- have either of you  
4 looked to see whether the circumstances that you described are  
5 covered in The Law Governing Lawyers? I know there are things  
6 on joint attorney-client privilege and what happens in the  
7 event of adversity. And I don't remember off the top of my --  
8 I know there were provisions on common interest privilege. I  
9 don't remember whether they deal with this or not. Has  
10 somebody looked?

11 MR. KARLAN: Your Honor, this is Mitch Karlan. The  
12 -- Section 76 of the Restatement, Third, of The Law Governing  
13 Lawyers states, quote, "Any such client," -- and that's a  
14 reference to a client who has entered into this kind of an  
15 agreement. "Any such client may invoke the privilege unless it  
16 has been waived by the client who made the communication." So  
17 I think that would address some of the papers we're talking  
18 about.

19 THE COURT: That are -- yeah. I don't have it in  
20 front of me, but I mean that's kind of why I asked the question  
21 whether as to the six documents, Mr. Karlan, that you say were  
22 authored by either your firm or other counsel for Wilmington  
23 Trust, whether it included -- if it was solely analysis, facts  
24 derived from your client that's one thing. If it's a part of a  
25 common interest and included facts that the other parties to

1 the common interest agreement provided and included on the  
2 analysis it must present a different circumstance.

3 Ms. Newman, do you have anything? I am going to have  
4 you do letter briefs.

5 MS. NEWMAN: Okay. The only thing I would add is I'm  
6 sure Mr. Karlan and I could confer and come to some agreement.  
7 Perhaps not perfect agreement but some agreement as -- on your  
8 question as to whether or not these are purely communications  
9 that reflect the impressions of Gibson, Dunn or whether or not,  
10 you know, it did -- may reflect some Akin Gump input. We still  
11 have the concern that if the GUC Trust unilaterally waives its  
12 own privilege that it could result in arguments down the line  
13 that the GUC Trust has waived not only with respect to these  
14 documents but with respect to a more voluminous group of  
15 documents. But I suppose that the GUC Trust's decision to  
16 make. I'm -- as a beneficiary of the GUC Trust that's -- or  
17 the representative of a number of the majority of beneficiaries  
18 of the GUC Trust that causes me grave concern. But of course  
19 that's Mr. Karlan's decision to make.

20 MR. BERMAN: Your Honor, this is Steve Berman on  
21 behalf of the plaintiffs. May I make a comment?

22 THE COURT: Sure. Go ahead.

23 MR. BERMAN: We are very concerned by the notion that  
24 the GUC Trust has a privilege log and can selectively pick and  
25 choose what it wants to waive the privilege on. So at some

1 point, we're going to want to file a brief I think addressing  
2 that issue and the issue of whether or not by doing so there is  
3 a subject matter waiver. And I don't know if the time would be  
4 after they file these briefs so we understand it a little bit  
5 more or -- I think that's the appropriate time but permit us to  
6 see what it is they're proposing. And again, we haven't seen  
7 this agreement at all. And I've asked for it, and it's not  
8 being given to me.

9 THE COURT: Well, let me ask Mr. Karlan and  
10 Ms. Newman. Is the common interest agreement itself subject to  
11 privilege of protection? I didn't think so.

12 MR. KARLAN: It says that it is, Judge. The  
13 agreement contains an agreement among the signatories not to  
14 disclose the existence of the agreement. And we only put it in  
15 our privilege log after first consulting with Ms. Newman and  
16 getting her permission to do so.

17 THE COURT: Okay.

18 MS. NEWMAN: We have no problem -- subject to the GUC  
19 Trust's agreement, we have no problem disclosing the agreement.

20 MR. KARLAN: Nor do I.

21 THE COURT: Well, let me ask you. Mr. Karlan and  
22 Ms. Newman and Mr. Berman, will you all agree that providing  
23 copies of the common interest agreement does not constitute a  
24 waiver of any privilege or protection with respect to any  
25 documents or information that are arguably covered by the

1 agreement?

2 I -- what I want to do if -- it seems to me  
3 reasonable to share the agreement. I know cases where that --  
4 I don't know precisely the law on this, but I certainly  
5 remember in practice where those agreements were disclosed. I  
6 just don't want anybody being able to argue that, well, you  
7 produced the agreement, consequently, you waive privilege or  
8 protection with respect to any underlying documents.

9 MR. BERMAN: This is Steve Berman, and I will not  
10 make that argument.

11 THE COURT: Mr. Karlan, are you satisfied with that?

12 MR. KARLAN: I mean I'm happy to enter -- you know,  
13 put -- you know, put an --

14 THE COURT: Here's what I suggest you do. Let's not  
15 do this totally on the fly. You ought to confer and -- on this  
16 issue. If you're in agreement that it can be produced with a  
17 -- no waiver or privilege, et cetera, see if you can do a form  
18 of a stipulation, and I -- which I would so order to do that.  
19 I do -- I just don't want to -- I don't want this coming back  
20 to bite somebody by the fact that you made the agreement  
21 available. Because I think it's important in trying to sort  
22 out these issues what the precise agreement is between the  
23 parties' sort of common interest agreement. See if you can  
24 work it out. If you can't let me know. Okay?

25 MR. BERMAN: Very good, Judge.

1           THE COURT: Hang on. I'm trying to look for  
2 something else. Bear with me a second. I -- I'm going to run  
3 back in chambers and get one of my books, okay? I'll be right  
4 back. Okay. I'm back on the bench. I just want to look  
5 something up. Bear with me.

6           (Pause)

7           THE COURT: Well, I can't find what I was looking  
8 for. I did pull out my copy of The Restatements. I -- Section  
9 -- I'm looking in Section 76 which I had bookmarked because  
10 I've obviously looked at this before.

11           Mr. Karlan, how much time do you want to do a letter  
12 brief?

13           MR. KARLAN: Your Honor, the deposition of  
14 Mr. Goldman is scheduled for the 16th. I don't know whether  
15 that's putting too much time pressure on Your Honor for a  
16 decision, but we're prepared to brief it as quickly as  
17 everybody else wants to go, fast.

18           THE COURT: I'm away the rest of this week. I'm  
19 going to be back --

20           MR. KARLAN: Ah, okay.

21           THE COURT: I'll be back in on the 13th, Monday the  
22 13th. So the rest of this week I'm gone.

23           MR. KARLAN: Then we'll submit whenever Your Honor  
24 wishes it.

25           THE COURT: Well, if -- Ms. Newman, how much time do

1 you want? I want these simultaneous. There's no reason to  
2 have sequential.

3 I guess what I'd ask if you could both do this by  
4 Monday morning the 13th, I'll endeavor to see if I can respond  
5 -- get this resolved before Mr. Goldman's deposition on the  
6 16th.

7 MR. KARLAN: That schedule works for us, Judge.

8 MS. NEWMAN: It works for us as well, Your Honor.

9 THE COURT: Okay. I don't intend to -- I'm sorry if  
10 I'm messing up anybody's weekend. But I can make you do it by  
11 Friday, but I'm not going to look at it until Monday when I get  
12 back.

13 MS. NEWMAN: The schedule works fine for us. Thank  
14 you. Thank you, Judge.

15 THE COURT: Okay. Look, I'm not going to impose a  
16 page limit, but these -- I'm intending these to be relatively  
17 succinct letter briefs, not voluminous briefs. I have -- you  
18 know, on this common interest, the reason I have the page  
19 bookmarked in -- on -- in the Restatement for Section 76 is  
20 I've dealt with this before, so this is not -- you know, it's  
21 not fresh in mind, but it will come back to me fairly quickly.  
22 So I -- I'm not -- I've been exposed to some of these issues  
23 before.

24 MR. BERMAN: Your Honor, this is Steve Berman. Do  
25 you want my brief on the same day?

1           THE COURT: I -- yes, I would if possible. And I  
2 know it's sometimes a little hard until you've seen what the  
3 other side says but I really would like you to get it in in the  
4 same time period. And you can --

5           MR. BERMAN: That's fine.

6           THE COURT: What I would request is is that you file  
7 it on ECF but you also email a copy to chambers so we don't  
8 have to go searching on the docket for it. My clerks can print  
9 it out, and I'll be back in court very early Monday morning. I  
10 usually get in around 6:30, 7:00 in the morning. So --

11          MR. BERMAN: Well, it's my birthday, so I assume it  
12 will be a really cogent document from me.

13          THE COURT: Happy birthday.

14          MR. TECCE: Your Honor, this is James Tecce for New  
15 GM. I just was -- wanted clarification as to what the subject  
16 matter of Mr. Berman's brief will be.

17          MR. BERMAN: The subject matter is the propriety of a  
18 party picking and choosing which documents it wants to waive  
19 the privilege on.

20          MR. TECCE: Okay. Thank you for that.

21          THE COURT: Well, you know, Mr. Berman, I don't know  
22 what these documents look like. If they're documents prepared  
23 by counsel, they're more likely to be attorney work product.  
24 And I'm not sure how any argument about subject matter waiver  
25 works when you're talking about work product, but I'll leave it

1 to you to do what you feel is appropriate.

2 MR. BERMAN: Okay.

3 THE COURT: Just try and keep it succinct, okay?

4 MR. BERMAN: I will, Your Honor.

5 THE COURT: All right. Anything else anybody needs  
6 to raise today?

7 MR. KARLAN: Not us, Your Honor.

8 THE COURT: There is -- there's something lurking in  
9 the back of my mind, and I can't remember where this -- I  
10 thought there was an amendment. But I don't remember whether  
11 it was an amendment in the rules of evidence or amendment in  
12 the rules of civil procedure dealing with the effect of  
13 production in one proceeding and an argument about waiver in  
14 any other proceeding. Does anybody know what I'm talking  
15 about? I only have a vague recollection about this. And I  
16 realize you're all -- because these documents you're talking  
17 about don't seem -- they weren't prepared with this case in  
18 mind. Maybe they were. I don't know. Any word I just said  
19 ring a bell with any of you?

20 MR. KARLAN: Not with me, Your Honor. But if we find  
21 anything like that we'll be sure to discuss it in our brief.

22 THE COURT: I'm probably dreaming anyway. Okay. I  
23 look forward to -- I'll do my best to see if I can get you in  
24 -- let me ask you one other question. We're talking about a  
25 limited number of documents.

1           I guess, Ms. Newman and Mr. Karlan, what is your view  
2 about in camera review about the documents? I'm obviously  
3 going to be the trier of fact. I'm always sensitive to this  
4 when I'm the trier of fact, but frequently with privileged  
5 documents it -- that's why I usually do insist on in camera  
6 review. It's a lot more meaningful to me when I have the  
7 documents in front of me and I have to evaluate the parties'  
8 arguments. What is your view with respect to in camera review?

9           Mr. Karlan first and then Ms. Newman.

10           MR. KARLAN: We would like you to review the  
11 documents in camera, Judge.

12           THE COURT: Ms. Newman?

13           MS. NEWMAN: We have no objection to that, Your  
14 Honor.

15           THE COURT: Okay. Deliver a -- we're talking about,  
16 what, 12 documents or 11?

17           MR. KARLAN: Six documents -- six documents, maybe 10  
18 pages long in total.

19           THE COURT: I thought there was six in category one  
20 and four in category two. That's why I got 10.

21           MR. KARLAN: I'm sorry if I misspoke, Judge. It's --  
22 the universe is six.

23           THE COURT: Okay.

24           MR. KARLAN: And then you asked me what -- there was  
25 a subset, and I said that subset is four.

1 THE COURT: Oh, okay. All right. So make sure you  
2 put the appropriate ledger attorney-client privilege, attorney  
3 work product on the documents, arrange to deliver one set in a  
4 sealed envelope to the Court. If you could do that by Friday  
5 so that I could look at the documents Monday morning when I  
6 come in that would be helpful. And I will review them myself.  
7 My law clerks won't review the in camera documents. That will  
8 be helpful to me.

9 MR. KARLAN: Very good, Judge.

10 THE COURT: Okay?

11 MR. KARLAN: Very good.

12 THE COURT: All right. Thanks very much, everybody.

13 MR. KARLAN: Thank you, Your Honor.

14 THE COURT: We're adjourned.

15 MS. NEWMAN: Thank you, Your Honor.

16 (Proceedings concluded at 4:31 p.m.)

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1                   **C E R T I F I C A T I O N**

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